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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DARLENE M. MEJIA, as Successor in Interest, etc. et al.,

Plaintiffs and Respondents,

v.

CITRUS NURSING CENTER et al.,

Defendants and Appellants.

E072232

(Super.Ct.No. CIVDS1823696)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Affirmed.

Wilson Getty, William C. Wilson, John T. Tsumura; Williams Iagmin and Jon R. Williams for Defendants and Appellants.

Law Offices of James E. Yee and James E. Yee for Plaintiffs and Respondents.

Darlene M. Mejia (Plaintiff), as an individual and as the successor-in-interest of Terri Lynn Redmond (Resident) sued Anousheh Ashouri, M.D. (Doctor) and the following list of defendants: Citrus Nursing Home (Citrus); Sun-Mar Health Care, Inc.;

Sun-Mar Management Services; Frank Johnson; Eli Marmur; and Irving Bauman (collectively, Defendants). The lawsuit included causes of action for (1) dependent adult abuse/neglect (Welf. & Inst. Code, §§ 15600 et seq.); (2) professional negligence; (3) fraud/misrepresentation; (4) negligent hiring and supervision; (5) violation of the Resident's Bill of Rights (Health & Saf. Code, § 1430, subd. (b)); and (6) wrongful death. Defendants petitioned to compel arbitration. The trial court denied the petition.

Defendants raise two issues on appeal. First, Defendants contend the trial court erred by not applying the Federal Arbitration Act (FAA) (9 U.S.C.A. § 1 et seq.). Second, Defendants contend the trial court erred by finding the arbitration agreement to be unconscionable. We affirm the order.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

The facts in this subsection are taken from Plaintiff's complaint. Resident was born on July 20, 1965. Resident suffered from "spina bifida, a congenital defect resulting in the incomplete development of her spinal cord and related paraplegia. She was also born with mild mental retardation." Plaintiff is Resident's sister. Doctor was Resident's primary care physician. Citrus is a long-term care skilled nursing facility.

Resident was admitted to Citrus in 2007. "Prior to her admission, [Resident] only rarely had urinary tract infections. Following her admission, however, she developed repeated infections, some of which were so severe she required hospitalization and/or intravenous antibiotics. The unending pattern of urinary tract infections was caused by defendants knowing failure to properly and timely identify,

report, and treat these infections, as well as the nursing staff's failure to render the proper hygiene and incontinence care to prevent infections from occurring in the first place in reckless and willful disregard for [Resident's] health and safety."

Plaintiff's complaint alleges many details of Resident's medical history. Rather than set forth all of those details herein, we provide three excerpts, so as to provide some background of the Resident's alleged medical history leading to her death.

The first excerpt: Resident was admitted to Arrowhead Regional Medical Center. Upon "admission, her urine collected on April 24, 2017 at 11:21 p.m. was red and turbid in sharp contrast to Citrus' fraudulent documentation that it was yellow and clear. [Resident] had to be given IV antibiotics due to the severity of the infection, resulting from the significant pattern of neglect by Citrus."

The second excerpt: From July 6, 2017, to July 18, 2017, Resident was hospitalized at Loma Linda University Medical Center "due to severe sepsis stemming from Citrus' repeated neglect of [Resident's] health and safety." Doctors at Loma Linda discovered Resident had not been provided one of her prescribed antibiotics while "at Citrus in reckless or willful disregard of her health and safety."

The third excerpt: "On September 9, 2017, [Resident] suffered several seizures requiring hospitalization at Kaiser Fontana." The Kaiser doctor "noted that [Resident's] increase in seizure activity over the prior 24 hours was most likely 'related to initiation of IV Imipenem 2 days ago at [Citrus] for treatment of ?urosepsis [*sic*] which was not renally dose adjusted and can also decrease seizure threshold and should not be used in Resident with hx of seizure.' Accordingly, [Doctor's] multiple failures leading to

prescribing Imipenem for a urinary tract infection caused or contributed to [Resident] suffering multiple seizures."

We now turn to the alleged facts closer in time to Resident's death. On June 4, 2018, Resident had "a neurology visit with Dr. Kamen at Loma Linda." Dr. Kamen "recommended a urinalysis at Citrus due to obvious signs and symptoms of infection, including foul odor. Neither Citrus nor [Doctor] ensured this urinalysis was performed in reckless or willful disregard for [Resident's] health and safety." On June 17, Plaintiff requested Citrus and Doctor perform a urinalysis and asked "whether a urinalysis was ever done in response to Dr. Kamen's recommendation on June 4, 2018."

On June 18, Doctor ordered a urinalysis. The June 19 lab results reflected a high white blood cell count and "many bacteria." "[Doctor] recklessly ordered IV Ertapenem for 10 days, which is a drug in the same class as Imipenem, the drug that caused [Resident's] multiple seizures in or around September 2017 . . . . That aside, Ertapenem is an antibiotic used only for severe infections and is commonly referred to as a 'big gun' in antibiotics, indicating that [Resident's] infection had been ignored and neglected for weeks in violation of doctor's orders and in reckless or willful disregard for her health and safety."

On June 23, 2018, "[a]t 11:50 a.m., a CNA noted [Resident] [was] not breathing and [had] no pulse. The CNA called the charge nurse . . . who responded, noted no breathing, and called code blue. . . . [Resident's] skin was warm. She was not breathing, had no pulse, and had no blood pressure. Left untreated for weeks, [Resident's] urinary tract infection had developed into a serious infection and/or sepsis

ultimately resulting in cardiac and respiratory arrest. CPR was not even attempted. Nor was 911 called. Citrus and [Doctor] merely noted her code status as DNR, despite [Resident's] Advance Health Care Directive requiring life sustaining treatment.

"Around 12:30 p.m., Citrus called the mortuary to pick up the body and fraudulently represented that [Resident] was on hospice for purposes of avoiding a coroner's investigation. Based on those misrepresentations, the mortuary picked up [Resident's] body and transported it to the mortuary."

The causes of action in the complaint included: (1) dependent adult abuse/neglect (Welf. & Inst. Code, §§ 15600 et seq.); (2) professional negligence; (3) fraud/misrepresentation; (4) negligent hiring and supervision; (5) violation of the Resident's Bill of Rights (Health & Saf. Code, § 1430, subd. (b)); and (6) wrongful death. Plaintiff sought general damages, special damages, attorney's fees, costs, restitution, treble damages, punitive damages, and any other proper relief.

B. PETITION TO COMPEL ARBITRATION

Defendants petitioned to compel arbitration. Defendants asserted Plaintiff signed an arbitration agreement (the agreement) as Resident's agent. Defendants contended that, in the agreement, "the parties mutually agreed to arbitrate claims arising out of the care and treatment rendered to [Resident] . . . , even wrongful death claims . . . , which is exactly what the Complaint on file herein asserts. Failure to grant the instant Petition will deviate from the clear intent of the parties that disputes, such as the instant dispute, be adjudicated in binding arbitration."

Defendants attached the agreement to their petition. The agreement is dated December 10, 2017. Article 1 of the agreement provides, in part, "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court processes."

Article 2 of the agreement provides, in part, "It is further understood that any dispute between Resident and [Citrus], its owners, operators, officers, directors, administrators, staff, employees, agents, and any management company that provide services to the Facility that relates to the provision of care, treatment and services the Facility provides to Resident (collectively referred to herein as 'Facility'), including any action for injury or death arising from negligence, intentional tort and/or statutory causes of action (including all California Welfare and Institutions Code sections), will be determined by submission to binding arbitration as provided by California law."

Article 6 of the agreement provides, in part, "Resident and Facility agree that California substantive law, including California Code of Civil Procedure § 667.7 and Civil Code §§3333.1 -3333.2 applies to any and all claims arising out of the care, treatment and services provided to the Resident by the Facility, including those claims outlined in Article 1 and Article 2. The parties agree that California Code of Civil Procedure § 1281.2(c) is excluded from this Agreement as the parties mutually desire to have any and all disputes outlined in Article 1 and 2 submitted to binding arbitration.

The parties do not want any claims not subject to arbitration to impede any and all other claims from being ordered to binding arbitration."

Article 7 of the agreement provides, in part, "This Agreement relates to Resident's admission to the Facility, and the Facility, among other things, participates in the Medicare and/or Medi-Cal programs and/or procures supplies from out of state vendors. The parties, therefore, agree that the underlying admission to the Facility involves interstate commerce. Accordingly, this Agreement invokes the Federal Arbitration Act."

C. OPPOSITION

Plaintiff opposed defendant's petition. Plaintiff asserted the agreement was unenforceable because Resident did not sign the agreement and Plaintiff did not have the authority to sign the agreement on Resident's behalf. Additionally, Plaintiff contended she did not waive her right, in her individual capacity, to bring a wrongful death claim before a jury.

Plaintiff also contended the agreement was invalid because (1) it purports to include all statutory causes of action, but it is improper for it to include a Health and Safety Code section 1430, subdivision (b), cause of action; (2) it lacks details regarding the arbitration process such as what arbitration rules apply, how an arbitrator will be selected, and the parties' appellate rights; and (3) the fee splitting provision is improper. Further, Plaintiff asserted the agreement did not comply with the Code of Federal Regulations pertaining to postdispute agreements. (Former 42 C.F.R. § 483.70(n)(2).) Plaintiff noted that the complaint concerned events arising before December 10, 2017—

the date the agreement was signed—which made the agreement a postdispute agreement.

Plaintiff asserted the agreement was unconscionable. Plaintiff argued the agreement was a contract of adhesion because defendants had "superior bargaining power compared to [Resident and Plaintiff]." Plaintiff argued the agreement was procedurally unconscionable because it omits (A) the applicable arbitration rules; (B) the procedure for selecting the arbitrator; (C) the costs of the arbitration; and (D) the parties' appellate rights.

Plaintiff asserted the agreement was substantively unconscionable because (1) it requires Plaintiff to pay her pro rata share of the arbitration costs, and Plaintiff would not have to pay such costs for an elder abuse claim litigated in court; (2) the limited discovery would "unreasonably hamper . . . Plaintiff's ability to prepare her case"; (3) the agreement limits punitive damages, but punitive damages are necessary "to hold skilled nursing facilities, like Citrus . . . , accountable for abuse or neglect"; and (4) the waiver of Code of Civil Procedure section 1281.2, subdivision (c)[1], which concerns denying a petition to compel arbitration when there is a risk of conflicting rulings, "is entirely one-sided" and favors Defendants.

Next, Plaintiff contended the petition should be denied because there is a risk of conflicting rulings. (§ 1281.2, subd. (c).) Plaintiff asserted, "[T]he claims for wrongful death and elder abuse necessarily overlap. These causes of action will require the same

[1] All subsequent statutory references will be to the Code of Civil Procedure unless otherwise indicated.

witnesses, require the same discovery, and the potential for conflicting rulings is overwhelming."

D. REPLY

Defendants replied to Plaintiff's opposition. Defendants asserted the agreement was enforceable because Article 8 of the agreement reflected Plaintiff was Resident's representative, and Plaintiff signed the agreement. Next, Defendants asserted Plaintiff could not rely upon section 1281.2, subdivision (c), to oppose their petition because the agreement "expressly prohibits invocation of this statute" and "the parties agreed that any petition to compel arbitration would be governed by the Federal Arbitration Act." Defendants asserted the fee splitting provision did not violate public policy because the agreement reflects the fees will be split "except as otherwise permitted by law."

E. HEARING

The trial court held a hearing on Defendants' petition. The trial court announced its tentative ruling at the beginning of the hearing. The court said that an evidentiary hearing would be required to determine if an agreement existed because there was conflicting evidence "about the facts and circumstances of the execution of the purported arbitration agreement," so the trial court would need a hearing to evaluate the witnesses' credibility. The trial court explained that, for the sake of saving "everyone's time and money" it would assume an agreement existed.

The trial court said, "I'd like to shelve the existence question if we can dispense with the need for an evidentiary hearing if there are other bases that it's an unenforceable agreement. And I think it is. [¶] Health and Safety Code Section 1430,

it specifically says that a suit shall be brought in a court of competent jurisdiction. It uses that mandatory language. [A]t the end of the statute it says that an agreement that waives the right to sue is void, is contrary to public policy. . . . [¶] The Federal Arbitration Act does govern this. This facility is clearly engaged in interstate commerce. But I don't think that that makes any difference. I think the California [L]egislature is still able to make a decision that certain types of claims are simply non-arbitrable under California law."

The trial court continued, "There are a couple of problems with this agreement. And it is such a vague agreement, it doesn't lay out what is really required. . . . [¶] But what I'm concerned about are the requirements that a neutral arbitrator be agreed upon by both parties, and that the agreement provide a selection of venue that is convenient to both parties. This agreement doesn't address that at all. [¶] I also think that the agreement is unconscionable. . . . I disagree that this is a contract of adhesion. . . . [¶] But there are other reasons that it is procedurally and substantively unconscionable. . . . What are the rules that are going to govern? You know, [AAA] isn't selected. JAMS isn't selected. There is no process invoked for how an arbitrator would be selected or who that arbitrator might be. So there are elements of surprise here that render this procedurally unconscionable.

"Then there's the issue of substantive unconscionability. . . . [¶] The cost sharing is not a problem because that could be severed from the agreement. . . . [¶] The problem with this agreement is the exclusion of Section 1281.2. And I think a 1281.2 waiver is invalid. The arbitration agreement says that claims will be determined by

submission to arbitration as provided by California law. [¶] This Court can't send some of the claims to arbitration and keep others in court because of the risk of inconsistent rulings. And so for those reasons—all those reasons, I would deny arbitration."

Defendants asserted, "[T]he agreement itself says it invokes the Federal Arbitration Act. And under the Federal Arbitration Act, they lay out how the selection of the arbitrator should proceed." Further, defendants contended, "In *Valley View*[2], the court said causes of action under 1430 are subject to arbitration. . . . [¶] I think that's especially the case when the arbitration agreement itself sets out that the arbitration is going to be subject to the FAA, which would take it out of California rules which would bar it from going in consideration to the federal arbitration. That's first and foremost. [¶] Second, your Honor, the argument that 1281 might set up inconsistent rulings, the parties anticipated that and agreed that 1281 is excluded under this contract."

The trial court asked if the waiver of section 1281.2 was valid. Defendants responded that the FAA does not have the same restrictions as California law and that "the parties expressly waived" section 1281.2. The court asked how that would work if some matters were litigated in court while others went to arbitration. Defendants said that everything would be handled in arbitration. Doctor's lawyer said that Doctor had not agreed to arbitration. The court said, "If I were to grant this petition to compel arbitration, the entire dispute isn't going to arbitration. Some if it remains in this court

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[2] *Valley View Health Care, Inc. v. Chapman* (E.D. Cal. 2014) 992 F.Supp.2d 1016.

subject to a stay, and we would have potentially a risk of inconsistent judgment." Defendants said, "[T]his is the first time I've heard this."

Plaintiff argued, "He's trying to say that all the procedures are laid out in the FAA. That's not true. It merely says something like you guys need your own arbitrator. It doesn't say pick the AAA. It doesn't say pick JAMS. It doesn't say anything to that effect. . . . [¶] That aside, . . . they never provided [Plaintiff] with a copy of [the rules]. So is she supposed to go out and search the Internet universe for those rules and scour through the FAA to figure out what those are? The answer is adamantly no." In regard to the *Valley View* case, Plaintiff asserted it is a federal case and the trial court is not bound by that decision.

The trial court recessed to research whether a California court had followed the *Valley View* decision. When the hearing resumed, the trial court said it did not find any California cases that followed *Valley View*. Plaintiff said the trial court had discretion as to whether it followed *Valley View*. Plaintiff argued, "Even the arbitration agreement says California law shall apply. So why should we now go to the federal law to see if that applies?"

The trial court said it also researched the FAA "and it doesn't appear that there are any rules in the [A]ct that govern the arbitration, other than the selection of an arbitrator. It says if the agreement does not select an arbitrator, the court can select the arbitrator. [¶] So I think that's taken care of, but nothing else procedurally is addressed."

Defendants responded, "[I]f that were the case . . . [then] any time an arbitration agreement is shared with either a resident or representative, you also [have to] hand out all the arbitration rules that are going to be followed." The trial court explained, "That actually is the law. Typically they're attached." Defendants responded, "I've never seen anything that requires . . . they hand out all the laws and procedures that are going to be followed under arbitration."

The court asked Defendants to address the issue of potentially inconsistent rulings. Defendants said they have "never really understood" the problem of inconsistent rulings. Defendants explained that they have different duties than Doctor, so if there were different outcomes then "it doesn't mean it's inconsistent. It just means that they determined that there were different duties owed and these—there was a breach of this duty or there wasn't a breach of that duty."

Plaintiff asserted that if she went to court against Doctor, then Doctor would blame Citrus, meanwhile, in arbitration, Citrus would blame Doctor. Plaintiff contended "[t]he potential is enormous" for inconsistent rulings.

The trial court concluded, "I'm going to find that this—even assuming that an arbitration agreement existed, that a contract was formed, . . . I find that this agreement is unenforceable for the reasons stated in my tentative ruling. So the petition to compel arbitration is denied."

DISCUSSION

A. CHOICE OF LAW

Defendants contend, "The trial court critically erred when, even after it recognized that the FAA controlled the agreement, it further opined that 'I don't think that makes any difference,' and that the state-made law could somehow still trump or supplant the FAA." For this court to determine if the trial court erred by concluding California law and the FAA were the laws chosen by the parties in the agreement, we must interpret the language of the agreement.

"[S]tate contract rules generally govern the construction of arbitration agreements." (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 384.) "[T]he starting point in the interpretation of the choice-of-law clause, like any contractual provision, is with the language of the contract itself." (*Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 722.) "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)" (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822.)

In Article 1 of the agreement, the parties agreed that disputes centered on Resident's medical care "will be determined by submission to arbitration as provided by

California law ." (§ 1295, subd. (a).) In Article 2 of the agreement, the parties used similar language, agreeing to "binding arbitration as provided by California law" for disputes centered on the care and services provided to Resident.

Defendants do not provide a contract interpretation analysis to support their argument. The substance of Defendants' argument focuses on how application of the FAA would have resolved the trial court's unconscionability concerns. Defendants' argument fails to provide a meaningful legal explanation of how the trial court erred by interpreting the agreement as including a choice of California law. Without an explanation as to how the trial court erred in its interpretation of the agreement, we cannot conclude that the trial court should have applied only to the FAA. We conclude Defendants forfeited this issue by failing to support it with meaningful legal analysis. (*Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, 15.)

B. UNCONSCIONABLE AGREEMENT

Defendants contend the trial court erred by finding the agreement was procedurally and substantively unconscionable. For the sake of judicial efficiency, we will assume Defendants are correct that the trial court erred in finding the agreement to be unconscionable. (See § 1295, subd. (e) [a contract is not unconscionable if it meets the statutory criteria]; see also *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 633, fn. 4 [failure to include arbitration rules does not, by itself, establish unconscionability]; compare *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406-1407 [failure to provide arbitration rules is procedurally unconscionable].)

We now turn to the issue of prejudice. We examine whether "a different result would have been probable if such error, ruling, . . . or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (§ 475.)

Defendants fail to discuss the issue of prejudice. In the trial court's tentative ruling, which became its final ruling, it said, "There are a couple of problems with this agreement. And it is such a vague agreement, it doesn't lay out what is really required. . . . [¶] But what I'm concerned about are the requirements that a neutral arbitrator be agreed upon by both parties, and that the agreement provide a selection of venue that is convenient to both parties. This agreement doesn't address that at all. [¶] I also think that the agreement is unconscionable."

The trial court found that the agreement is vague. Where the object of a contract is "so vaguely expressed as to be wholly unascertainable, the entire contract is void." (Civ. Code, § 1598.) The agreement does not indicate (1) the location for the arbitration (e.g., California, Texas, Peru); (2) what rules will be used in the arbitration; and (3) how an arbitrator will be selected. The agreement provides for arbitration but omits key details.

Defendants' failure to address the issue of prejudice and failure to address the trial court's finding that the agreement is vague, causes us to conclude that defendants have not demonstrated that, but for the assumed unconscionability error, a different result would have been probable. (§ 475.) Therefore, we do not reverse the order.

DISPOSITION

The order is affirmed. Respondents are awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.